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No. 330

In the

Supreme Court of the United States

OCTOBER TERM, 1956

On Appeal from the Supreme Court of the State of Ohio

KINGSTON ACHE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF FOR APPELLANT

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No. 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

MOTION TO DISMISS

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MOTION TO DISMISS

Now comes the Columbus Bar Association, appellee in the above entitled case, and moves to dismiss this appeal on the grounds that no jurisdiction attaches for the following reasons:

A) the four questions presented by appellant were not timely or properly raised in the state court proceedings;

B) the four questions presented by appellant are so unsubstantial as to need no further argument.

ARGUMENT

The Four Questions Presented by Appellant Were Not Timely or Properly Raised in the State Court Proceedings.

Question 1

Appellant's question No. 1 contains his initial reference to the Fourteenth Amendment to the Constitution of the United States and the particular complaint of an abridgement of the privileges and immunities of a citizen of the United States. Nowhere in the state court proceedings do we find that he has framed a Federal question or called the attention of either the Board of Commissioners on Grievances and Discipline or the Supreme Court to any specific provisions of the Constitution of the United States.

While it is true that appellant previously raised the issue of the omission of the term "moral turpitude" from the definition of misconduct as set forth in Amended Rule XXVII of the Supreme Court of the State of Ohio, he did not do this within the framework of a Federal question, and in fact appellant made no mention of whether he was referring to the State or Federal Constitution. This Court has long followed the rule that allegations of unconstitutionality of a general nature are deemed to refer to the

constitution of the state in question, and, moreover, that to raise a Federal question the grounds for same must be called to the state court's attention with precision. *New York ex rel. Bryant v. Zimmerman*, 278 US 63 at 67-68, 49 S Ct 61, 73 L ed 184; *Bowe v. Scott*, 233 US 658 at 664-665, 34 S Ct 769, 58 L ed 1141.

Attached hereto as Appendix A are the objections which appellant made in the Supreme Court of Ohio to the findings and recommendations of the Board of Commissioners on Grievances and Discipline. Similarly, Appendix B is a reprint of appellant's application for re-hearing in the Supreme Court of Ohio. In neither the objections or the application for re-hearing does appellant point out a provision of the United States Constitution which was allegedly violated.

It is further noted that appellant's jurisdictional statement makes numerous references to constitutional questions raised in briefs filed with the Board of Commissioners and the Supreme Court of Ohio. Not only do these references fail to reveal that a Federal question was raised timely, properly, or with precision, but also this Court has held that briefs are not part of the record for the purpose of raising a Federal question. *Lynch v. N. Y. ex rel. Pierson*, 293 US 52 at 54, 55 S Ct 16, 79 L ed 191; *Live Oak Association v. Railroad Commission*, 269 US 354 at 357-358, 46 S Ct 149, 70 L ed 305; *Harding v. Illinois*, 196 US 78 at 84, 25 S Ct 176, 49 L ed 394.

Question 2

Appellant's second question really raises two questions which are alleged to be in violation of the Fourteenth Amendment of the Constitution of the United States. The first question is whether the substitution of a "written com-

plaint alleging misconduct" for "written charges" violates the due process clause. In objections four and five filed by appellant in the Supreme Court of Ohio we find the phrases due process and unconstitutional, but there is nothing to indicate that he intended to raise a Federal question, for the manner in which he now alleges the issues were raised was in the following words:

> "4. That the entire proceedings before the Panel deprived the Respondent of due process.
>
> "5. That the entire proceeding before the Panel was unconstitutional."

Such a blanket condemnation of the entire proceedings cannot as an afterthought be said to raise a substantial Federal question with the precision required to have it reviewed by this Court.

Upon the authorities cited above, it is submitted that these issues were neither timely nor properly raised.

The second subdivision of this question, dealing with the burden of proof required in disciplinary cases is likewise totally absent from the record unless we wish to say that by calling the entire proceedings unconstitutional a substantial Federal question was raised with the precision required for review by this Court.

Questions 3 and 4

The third question presented complains of a retroactive application of Canons 34 and 35. The fourth question claims that there was an absence of any person aggrieved. Questions three and four are alleged to be violations of the due process and the equal protection clauses of the Fourteenth Amendment, and, additionally, question three is allegedly in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

In *Oxley Stave Co. v. Butler County*, 166 US 648 at 655, 17 S Ct 709, 41 L ed 1149, this Court held:

> "* * * the jurisdiction of this court to re-examine the final judgment of the state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also, *Godchoux Co. v. Estopinal*, 251 US, 179 at 181; *Beck v. Washington*, 369 US 541, 8 L ed 2d 98, 82 S Ct 955, reh den, 370 US 965, 8 L ed 2d 834, 82 S Ct 1575.

It is submitted that appellant has not complied with the above quoted rule. Although it is not sufficient to raise a constitutional question by brief only, the sole place in which appellant specified a violation of any constitution was at page 24 of his brief before the Supreme Court of Ohio in which he stated:

> "While we realize that the constitutionality of Amended Rule XXVII has been passed upon, we would be remiss if we do not include our thinking that the Rule is unconstitutional * * * definitely as to application and also as it is written. It is the contention of the Respondent that the Rule and the creation of the Board of Commissioners on Grievances and Discipline is a violation of the guarantees afforded to citizens of a separation of powers of legislative and judicial branches of state government. We also submit that it is a violation of the Constitution of the State of Ohio, Article II, Section 1."

Otherwise, the Federal questions alleged to have been raised in the court below are simply vague allusions to some constitution without specifying whether it is the Ohio Constitution or the Federal Constitution, and it would strongly appear that the Federal questions now alleged to exist are mere afterthoughts, for in considering any con-

stitutional questions which did arise the Ohio Supreme Court held in this case (*Bar Assn. v. Agee*, 175 Ohio St., 443 at 444) as follows:

> "The respondent alleges that the proceedings before the panel were unconstitutional and deprived the respondent of due process. This issue was raised and rejected in *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St., 17. The subject was considered in detail in that case and merits no further consideration here."

The Court's attention is further called to the fact that the case of *Mahoning County Bar Assn. v. Franko*, 168 Ohio St., 17, dealt only with questions arising under the Ohio Constitution, and it was held as follows at page 25:

> "It is at once apparent that a finding by this court regarding the power of the General Assembly to enlarge upon a prohibition imposed by the Constitution is in no way connected with the power of this court to impose certain standards of conduct upon all members of the legal profession of this state as conditions to maintenance of their status as such members."

Moreover, this Court denied certiorari in that case. *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, Cert. den. 358 US 932.

The Four Questions Presented by Appellant are so Unsubstantial as to Need no Further Argument.

Appellant complains that the omission from Rule XXVII of the former requirement that moral turpitude be found as a condition precedent to disbarment has deprived him of a constitutional right. Appellee notes on page 10 of appellant's jurisdictional statement that the first statute cited, Section 563 of the Revised Statutes of Ohio, provided as early as 1885 that an attorney could be disbarred with the following causes:

> "* * * misconduct in office, conviction of a crime involving moral turpitude or unprofessional conduct involving moral turpitude * * * "

Although moral turpitude could be the basis for a disbarment under that statute, it is equally clear that "misconduct in office" standing alone was sufficient to justify a disbarment, and "misconduct in office" is a violation of the Canons of Professional Ethics.

Essentially what appellant is saying is that the Supreme Court of Ohio has no inherent power to disbar attorneys and to provide by rule the procedure for such disbarment. This argument has been made previously in *Cleveland Bar Assn. v. Pleasant*, 167 Ohio St., 325, Cert. den. 358 US, 842; *Mahoning County Bar Assn. v. Franko*, 168 Ohio St., 17, Cert. den. 358 US 932, and *Re McBride*, 164 Ohio St., 419, Cert. den. 351 US 965. Although this same issue was raised in each of these cases, it is noted that certiorari was denied in each, and we believe that it would not present a substantial question at this time even if it were timely and properly raised in the court below.

Review of cases from other states reveals that the Court's inherent jurisdiction to disbar, suspend, or otherwise discipline attorneys is well established. *State v. Mosher*, 128 Iowa 82, 103 NW, 105; *Lenihan v. Commonwealth*, 165 Ky. 93 176 SW, 948; *Re Ebbs*, 150 N. C. 44, 63 SE, 190; *Wolfe's Disbarment*, 288 Pa. 331, 135 A 732; 7 *American Jurisprudence 2d*, "Attorneys at Law," Sections 40 and 42.

In this connection we fail to understand the relevance of appellant's citation of *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 US 232, 1 L ed 2d 796, 77 S Ct 752. This case, as the caption implies, concerned an applicant to the bar and held that a state could only preclude such an applicant on grounds of moral turpitude, lack-

of proficiency in the law, or other valid reasons. An applicant for the bar, however, is not bound by the Canons of Professional Ethics, but once he has been admitted to the bar he is so bound, and consequently a violation of the canons will justify a disciplinary proceeding regardless of whether that violation involved moral turpitude.

Appellant next complains, at page 12, as follows:

> "In addition 'written charges' as required by Section 4705.03 of the Revised Code of Ohio, has been reduced to a 'complaint alleging misconduct', the requirements provided by the said Rule XXVII."

Section 8 of Rule XXVII provides as follows:

> "A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent."

Frankly, we fail to perceive any distinction between the phrase "written charges," as used in Section 4705.03 of the Revised Code of Ohio, and the phrase "formal written complaint," as used in Section 8 of Rule XXVII. At best it might be designated as a distinction without a difference, but it is so slight as not to warrant further argument.

Appellant next criticizes the quantum of evidence required in a disciplinary proceeding. He cites in support of this contention *In re Chappel*, 12 Ohio Ops. 499, 3 NE 2d 393, which is an Ohio appellate court decision requiring that the evidence warranting disbarment must be "clear and convincing." He has further failed, however, to apprise this Court that *In re Chappel* was subsequently discussed by the Supreme Court of Ohio in *In re Lieberman*, 163 Ohio St. 35 at 42, prior to the adoption of Rule XXVII. The *Lieberman* case specifically rejected the reasoning of the *Chappel* case and held in its syllabus as follows:

> "The degree of proof required in a disbarment proceeding is a preponderance of the evidence."

Perhaps this would explain appellant's statement at page 13, "The question of the quantum of the evidence is not explicit in the judgment review of which is sought * * *," which we assume to mean that he is not seriously pressing this issue.

Appellant's third question alleges that he has been suspended from the practice of law by a rule of law which was retroactively applied to him and which is consequently an *ex post facto* law. The rationale here is that between the time of the decision of *Goodman v. Beall*, 130 Ohio St. 427, and the decision of *In re Brown, Weiss and Wohl*, 175 Ohio St. 149, both of which were cases involving the unauthorized practice of law, a layman could represent claimants in compensation cases before the Industrial Commission of Ohio. Appellant's disbarment hearing was held two months before the *Brown, Weiss and Wohl* case decided on July 10, 1963, that the practice before the Industrial Commission *for a fee* was the practice of law. Appellant then concludes that it was permissible for him to pay a lay compensation specialist $48,000 in 1961 for compensation cases referred to him. Such a conclusion overlooks the caveat to attorneys in *Goodman v. Beall*, 130 Ohio St. 427 at 430-431 (set out in the appendix to appellant's jurisdictional statement at page 53):

> "Since the inception of the Workmen's Compensation Act it has been common practice for laymen to assist an injured or diseased workman or his dependents in the submission of a claim. Often this is done as an accommodation by representatives of an organization to which a claimant may belong, and such usually simple services are for the most part performed in an expeditious and satisfactory manner. In our judg-

ment this is not the practice of law; *but in so holding it is neither our intention nor purpose to modify the definition of the practice of law announced in the first paragraph of the Syllabus of Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650." (Emphasis added)

In disposing of this contention, we can do no better than to quote the language of the Supreme Court of Ohio in the instant case (*Bar Assoc. v. Agee*, 175 Ohio St. 443 at 446):

> "Respondent contends that, since laymen were permitted to practice before the commission, a lawyer representing a claimant on an Industrial Commission case could ethically share his fee with a layman until the decision in the *Brown, Weiss and Wohl case*. This is a *non sequitur*.
>
> "Although it may be true that the prohibition in Canon 34 is limited to fees received for legal services, services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer. There are many areas in which personal services do not constitute the practice of law when done by a layman but which are the practice of law when performed by an attorney, *e. g.*, work in the fields of income tax and trademarks. The respondent seemed well aware that his work constituted legal services since he contracted with claimants in his name as an attorney. Authorizations from claimants were obtained in the name of 'Mr. Kenneth Agee, Attorney at Law.' He, therefore, could not ethically divide his fees for such services with a layman, even though the layman could have performed the same services."

Appellant's last contention is directed to Section 8 of Rule XXVII which reads as follows:

> "THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed

by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved."

Because the rule concludes with the sentence "The complaint may also, but need not, be signed by the person aggrieved," appellant concludes that this means that it must be signed by a person aggrieved. We cannot agree with this for the very basic reason that the Canons of Professional Ethics are designed to protect individuals, society in general, and the bench and bar from the conduct of an unethical practitioner. Thus under the canons there may be an individual that has been aggrieved who may make complaint to the bar association or the Board of Commissioners on Grievances and Discipline. In many instances, however, there will be no individual who is personally aggrieved but the bar association and society in general must be protected against unethical practices, and it is in these cases that the bar steps in to clean its own house before an individual is aggrieved. This is exactly the situation which we have at hand, and we know of no more appropriate description of the situation than the language of Justice Harlan in *Cohen v. Hurley*, 366 US 117 at 123-124, 6 L ed 2d 156 at 162, 81 S Ct 954:

"History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind: That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

We find no merit in appellant's contention that a bar association cannot endeavor to maintain professional standards and bring disciplinary actions prior to the time an individual is aggrieved; and from the fact that appellant has made no attempt to show wherein he was denied the equal protection of the law, we rather suspect that appellant does not believe that a substantial question exists here.

CONCLUSION

From the foregoing it is the position of appellee that appellant did not timely or properly raise a Federal question in the Supreme Court of Ohio with such preciseness that it was apparent that he intended to assert a Federal right. Certainly this was not apparent to the Supreme Court of Ohio, for it did not decide any Federal issues. Appellant's jurisdictional statement asserting Federal questions might be characterized as merely an afterthought to the real issues which were decided against him. In addition, appellant has not presented any question in his jurisdictional statement which is substantial or which has not been raised previously in this Court in cases pending on certiorari from the Supreme Court of the State of Ohio. For these reasons the appeal should be dismissed.

Respectfully submitted,

S. Noel Melvin,
Counsel for Appellee,
J. Raymond Prohaska,
Of Counsel for Appellee,
James C. Justice,
Of Counsel for Appellee.

APPENDIX A

IN THE SUPREME COURT OF OHIO

D. D. No. 48

COLUMBUS BAR ASSOCIATION,
Relator,

vs.

KENNETH AGEE,
Respondent.

RESPONDENT'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS OF BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Now comes the Respondent herein and respectfully files his Objections to the Findings and Recommendations of the Board of Commissioners on Grievances and Discipline, certified to this Court on May 14, 1963, to the confirmation of said Report, and to the entry of any disciplinary order in this case. The grounds for said Objections are as follows:

1. That the Findings and Conclusions of the Board of Commissioners on Grievances and Discipline to the effect that the Respondent has been guilty of misconduct within the meaning of Paragraph 5 of Rule XXVII of the Supreme Court of Ohio are not supported by the evidence.
2. That the Findings and Conclusions of the Board of Commissioners on Grievances and Discipline are not supported by the law.
3. That the Respondent was not afforded a fair legal hearing before the Panel inasmuch as the Panel refused to rule upon certain requests and motions made by the Respondent.
4. That the entire proceedings before the Panel deprived this Respondent of due process.

5. That the entire proceedings before the Panel was unconstitutional.
6. That the Board of Commissioners on Grievances and Discipline never examined the record to determine the sufficiency of the charges and evidence against the Respondent.
7. That the recommendations of such Board to the Supreme Court recommending that the Respondent, Kenneth Agee, be suspended indefinitely from the practice of law are not justified or supported by the evidence, and are unduly harsh and severe.

/s/ George E. Tyack,
Eight East Broad Street, Columbus 15, Ohio,
and
/s/ Harry B. Reese,
16 East Broadway, Wellston, Ohio,
Attorneys for Respondent.

APPENDIX B

IN THE SUPREME COURT OF OHIO

COLUMBUS BAR ASSOCIATION,
Relator,

vs.

KENNETH AGEE,
Respondent.
D. D. No. 48

APPLICATION FOR REHEARING

[Filed February 4, 1964]

Now comes the Respondent herein, Kenneth Agee, and makes application for rehearing from the per curiam decision of this Court overruling the objections of Respondent to the findings of the Board of Commissioners on Grievances and Discipline and approving the recommendations of the Board that Respondent be suspended indefinitely from the practice of law in the State of Ohio.

Respondent respectfully states that the opinion herein includes conclusions which were not supported by the evidence in that there is reference to a Portsmouth office which is not borne out by the facts as the record indicates. There is also reference to a private telephone line which is contrary to the evidence inasmuch as the telephone appearing on the stationery of the Respondent actually is service to Columbus and rings in Columbus and not in any number in Portsmouth.

Respondent respectfully states that this application should be granted because of the obvious misunderstanding of the testimony in that prior to the decisions made in *Brown, Weiss and Wohl* if this matter was the practice of

law, it was the type of "law" that was authorized to be practiced by laymen in that the Boards permitted and licenses laymen to practice.

Further, Respondent feels that the Court misconstrued the relationship with Mr. Sullens who was an independent lay practitioner and, by and large, the clients going to the office of Mr. Sullens were the clients of Mr. Sullens since Mr. Sullens was authorized to do all of the necessary functions to process their claims.

Respondent further feels that there are conclusions drawn in the closing portion of the decisions concerning "funneling" which are not supported by the record.

Respondent further feels that his constitutional rights have been infringed upon in that the order of the Court actually deprives him of any right to practice before any boards, commissions, etc. even though lay persons are permitted to practice before many of these boards and commissions. Under the terms of the suspension ordered, Respondent would be deprived of rights as an individual entirely apart from any rights which he would have as an attorney.

WHEREFORE, Respondent respectfully prays that this Honorable Court allow the within application for rehearing for the reasons set forth.

Respectfully Submitted,

/s/ George E. Tyack,
Attorney for Respondent.